IN THE

Supreme Court of the United States

October Term, 1976

No. 76-496

BENSON A. WOLMAN, *et al.*,
Appellants,

v.

MARTIN W. ESSEX, *et al.*,
Appellees.

On Appeal from the United States District Court for the Southern District of Ohio

BRIEF OF THE ANTI-DEFAMATION LEAGUE OF B'NAI B'RITH, *AMICUS CURIAE*

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Interest of the *Amicus*

B'Nai B'rith, founded in 1843, is the oldest civic service organization of American Jews, and represents a membership of more than 400,000 men and women and their families. The Anti-Defamation League of B'Nai B'rith was organized in 1913 as a section of the parent organization to advance good will and proper understanding between Americans and translate into greater effectiveness the ideals of American democracy. It is dedicated to upholding both the separation of church and state called for in the Establishment Clause, and the right to free exercise of religion, both of which are nothing more than the two

sides of that principle of religious liberty upon which our Republic was founded.

In support of these principles, this *amicus* has previously filed briefs in this Court in such cases as *Abington School District* v. *Schempp*, 374 U.S. 203 (1963), *Sherbert* v. *Verner*, 374 U.S. 399 (1963), *Board of Education* v. *Allen*, 392 U.S. 236 (1968), *Lemon* v. *Kurtzman*, 403 U.S. 602 (1971), *Lemon* v. *Sloan*, 413 U.S. 825 (1973), *Meek* v. *Pittenger*, 421 U.S. 349 (1975), *Parker Seal Company* v. *Cummins*, —— U.S. —— (1976), and *Trans World Airlines, Inc.* v. *Hardison*, now pending before this Court.

Summary of Argument

This brief rests on two general principles: the continued support of the Anti-Defamation League for the First Amendment principle of separation of church and state in the manner which effectively avoids the type of entanglement and strain which inevitably results from state aid to church-sponsored schools, and the belief that efforts to circumvent the separation principle such as those now before this Court should not be permitted for they go beyond the conduct allowed under the standard in *Everson* v. *Board of Education*, 330 U.S. 1 (1947), and fall within the prohibited type of state support to parochial schools as exemplified by *Lemon* v. *Kurtzman*, 403 U.S. 602 (1971).

Applying the now familiar three part test to judge the constitutionality of statutes which provide state aid to church-related activities, the materials and services provided by the Ohio statute, with some exceptions, violate

the restrictions of the Establishment Clause. The exceptions are noted below.

The provision of instructional materials and equipment clearly violates the Establishment Clause, even though the statute now purports to have the State lend those materials to the students, rather than to the non-public schools which they attend. That distinction between this case and *Meek* v. *Pittenger*, 421 U.S. 349 (1975) makes no substantive difference in terms of constitutional permissibility. The Ohio statutory scheme has in fact the same "impermissible primary effect of advancing religion" as did the arrangements in *Meek*, *Committee for Public Education* v. *Nyquist*, 413 U.S. 756 (1973), and *Sloan* v. *Lemon*, 413 U.S. 825 (1973).

Of the other services provided by the Ohio statute at public expense, we submit that (1) guidance and counseling services and tests and scoring services may not be provided either on or off public school premises by the State since they deal essentially with the educational function of the schools and present very clear potential for the type of entanglement described in *Lemon;* (2) speech and hearing diagnostic services and diagnostic psychological services are also involved in the educational process and thus contain the same danger of entanglement if furnished on the premises of non-public schools; and (3) those speech and hearing diagnostic services as well as therapeutic psychological, speech and hearing services, and services for the physically handicapped may be provided at state expense with appropriate safeguards to non-public school students without violating the Establishment Clause but only if provided in public centers, or on public school or other public premises, as part of a general program in those areas by public personnel.

Certain types of health care services such as inoculations and X-ray diagnosis which do not involve a potential for entanglement of the State in the educational process may be provided even on parochial school grounds if they are a part of a general program of state provided health care and do not constitute a subsidy, e.g. provision of a full-time doctor.

ARGUMENT

Introduction

The Anti-Defamation League of B'nai B'rith [ADL], has based its position in this difficult area of church-state relationships on the political principle contained in the Establishment and Free Exercise clauses of the First Amendment. This guiding principle has been expressed in any number of ways, but none has improved upon Thomas Jefferson's formulation, in replying to an address of the Danbury Baptists Association.

> Believing with you that religion is a matter which lies solely between man and his God, that he owes account to none other for his faith or his worship, that the legislative powers of government reach actions only, and not opinions, I contemplate with solemn reverence that act of the whole American people which declared that their legislature should "make no law respecting an establishment of religion, or prohibiting the free exercise thereof," thus building a wall of separation between church and state.[1]

1. Quoted in Pfeffer, Leo, Church, State and Freedom, Boston, The Beacon Press, 1953, p. 119. See also *Everson* v. *Board of Education*, 330 U.S. 1, 15-16 (1947).

It is the idea of a *wall of separation*, first put in those terms by Jefferson, which is the basis for the views expressed in this brief, for the ADL, itself a religiously-based organization, believes that history has vindicated the view expressed by the Founding Fathers, particularly Jefferson and Madison, that a wall of separation effectively protects the church and the state from each other,[2] and that such a wall was an essential element in the constitutional scheme of a government of limited powers. This Court's decisions in *Lemon* v. *Kurtzman*, 403 U.S. 602 (1971), *Committee for Public Education* v. *Nyquist*, 413 U.S. 756 (1973), and *Meek* v. *Pittenger*, 421 U.S. 349 (1975), correctly interpreted the Establishment Clause and have drawn a line which is sufficiently bright to forestall further breaches of the wall of separation in the area of state-support of elementary and secondary school education.[3]

We submit that distinctions can be properly drawn between *Allen* on the one hand and *Lemon*, *Nyquist* and *Meek* on the other, which will allow non-public school students to enjoy certain services and benefits that are generally available to public school students, without further breaching the wall of separation. The distinction which we draw, and which we urge upon the Court, is be-

2. See Pfeffer, *op.cit.*, chapters 1-5.

3. To the extent that *Board of Education* v. *Allen*, 392 U.S. 236 (1968) permitted the free loan of textbooks to parochial school students without a showing of the underlying facts, we contniue to disagree with that determination. We believe that in an appropriate case, as in *Dickman* v. *School District*, 232 Ore. 238, 366 P.2d 533 (Ore. Sup. Ct. 1960), cert. denied, 371 U.S. 823 (1962), the factual showing to support a determination of unconstitutionality could be established. However, the aid package here must be viewed as a whole (see *Meek* v. *Pittenger*, *supra* at 364-66), and the issues of entanglement and primary purpose must be assessed in light of the entire Ohio statute.

tween those state-supported benefits which involve the educational function of the parochial schools, and those which are unrelated to that function, which primarily serve the health and welfare of the parochial school pupils, which are made generally available to students in all public and private schools, and which are furnished off the premises of the non-public schools. In the case of pure health services such as innoculations or X-ray screening, there is no danger of entanglement and they may therefore be furnished in the parochial schools themselves. Others, such as the variety of diagnostic and therapeutic services provided by the statute before the Court, are so close to the educational stream, that they present clear constitutional problems when performed in the parochial schools, but may under certain conditions not violate the Establishment Clause when furnished as part of a general program on public premises. Still other services, such as the provision of instructional materials and equipment, are so integrated into the educational function as to be clearly prohibited. And guidance and counseling services cannot be provided even on public premises because of the great danger of involvement in the educational role of the parochial schools.

Under the terms of O. R. C. §3317.06, five categories of materials or services are to be provided to non-public schools or their students from public funds:

1. Instructional materials and equipment [§§3317.06 (B) & (C)];
2. Speech, hearing, and psychological diagnostic services to be furnished on the premises of the non-public school [§§3317.06(D) & (F)];

3. Speech, hearing, and psychological therapeutic services, guidance and counseling services, and remedial services for blind, deaf, emotionally disturbed, crippled and physically handicapped children to be furnished off the premises of the non-public school in "public schools, in public centers, or in mobile units located off of the non-public school premises . . ." [§§3317.06(G)(H)(I) & (K)];
4. Standardised testing and scoring services to be furnished on the premises of the non-public school [§3317.06(J)]; and
5. Field trip transportation [§3317.06(L)][4].

It is the ADL's position that the Ohio statute must be held unconstitutional in large part because in many respects it authorizes the expenditure of public funds for forbidden educational services within parochial schools. Other provisions of the statute which extend non-educational benefits to parochial school students can survive constitutional scrutiny if they meet certain conditions concerning the place at which and the manner in which they are furnished.

1. The Test to be Applied

As most recently stated in *Meek* v. *Pittenger, supra* at 358, the now familiar constitutional test for statutes challenged under the Establishment Clause consists of three elements: the statute must have a secular legislative purpose; it must have a "primary effect" that neither ad-

4. Section 3317.06(A) also authorizes the state to lend textbooks to pupils. While we oppose this provision, we rely upon appellants' argument on the point. See note 3, *supra*.

vances nor inhibits religion; and the statute and its administration must avoid excessive government entanglement with religion.[5]

The Pennsylvania statute at stake in *Meek,* in addition to free textbook loans to students, provided for the supply at public expense of various instructional materials and equipment, and diagnostic and therapeutic services to non-public schools. The materials, equipment and services were, with some minor and irrelevant differences, essentially the same as those to be supplied in this case.[6] The difference in the statutory scheme, seen as significant by the State of Ohio, is that the Pennsylvania statute spoke of lending the instructional materials to the schools rather than to the pupils; and all of the auxiliary services in Pennsylvania were to be performed on the premises of the non-public schools, though by employees of the public school system.

The Court in *Meek* struck down the loan of instructional material and equipment to the schools on the ground that that scheme had the "unconstitutional primary effect of advancing religion because of the predominantly religious

5. Our argument proceeds, of course, from the common premise that, as found by the court below, "the character of these [Ohio non-public] schools is substantially comparable to that of the schools involved in *Lemon* v. *Kurtzman,* 403 U.S. 602, 615-18 (1971)" (J.S. p. A8).

6. The services under the Pennsylvania statute included "counseling, testing and psychological services, speech and hearing therapy, teaching and related services for exceptional students, for remedial students and for the educationally disadvantaged, and such other secular, neutral, non-ideological services as are of benefit to non-public school children and are presently or hereafter provided for public school children of the Commonwealth." 421 U.S. at 353.

The materials and equipment included periodicals, photographs, maps, charts, sound recordings, films and projection, recording and laboratory equipment. *Id.* at 355.

character of the schools benefiting from the Act." 421 U.S. at 363. Describing the aid as "massive,"[7] the Court held that it was "neither indirect nor incidental." Id. at 365. And the Court struck down the provision of all the auxiliary services on the ground that "excessive entanglement would be required for Pennsylvania to be 'certain,' as it must be, that Act 194 personnel do not advance the religious mission of the church-related schools in which they serve." Id. at 370.

2. Instructional Materials and Equipment

The fact that the Ohio statute provides in terms that materials are to be lent "to pupils" rather than to the non-public schools directly, is precisely the kind of "legal minuet"[8] which the State ought not be allowed successfully to dance, for the sole difference between the Ohio and Pennsylvania schemes is in the words inserted into the Ohio statute which purport to establish that the materials and equipment are loaned to the pupils. The wholly fictional nature of that purported legal relationship between the pupils and the materials is made obvious—if it is not obvious enough by itself—by the additional terms of §§3317.06(B) and (C) which authorize the expenditure of public funds "to hire clerical personnel to administer such lending program," and by §3317.06(L) which explicitly al-

7. The aid in *Meek* said to be "massive" averaged $30 for each non-public school pupil for auxiliary services. 421 U.S. at 352, n.2. The aid provided by the Ohio statute before the Court averages $176 for each non-public student per year for all the programs (J.S., p. A32), six times the average Pennsylvania figure. That is at least as "massive" as the aid supplied in *Meek*, even taking into account that it includes instructional materials and equipment, and field trip transportation.

8. *Lemon* v. *Kurtzman, supra* at 614.

lows the materials and equipment to be stored on the premises of the non-public school, and allows the publicly-employed clerical administrators of the program to perform all their duties on those premises as well.

The constitutionality of the Ohio program is based on a will-of-the-wisp distinction that is so abstract that the statute has exactly the same "impermissible primary effect of advancing religion" as the arrangement in *Meek*. The statutory distinction is meaningless for the additional reason that, like the tuition grants in *Nyquist*, "the effect of the aid is unmistakably to provide desired financial support for nonpublic, sectarian institutions." 413 U.S. at 783. As the Court said in *Sloan* v. *Lemon*, 413 U.S. 825, 832 (1973), "... we look to the substance of the program and no matter how it is characterized, its effect remains the same."[9] See also *Public Funds for Public Schools* v. *Marburger*, 358 F. Supp. 29, aff'd., 417 U.S. 961 (1974). To sustain the statute would require the Court to ignore reality, a pose which it explicitly declined to strike in *Meek*. 421 U.S. at 365.

3. Auxiliary Services

Of the various auxiliary services to be provided from public funds under the Ohio statute, we believe that the Constitution forbids some of them from being furnished at all; that, with two exceptions, none of them can constitutionally be conducted on the premises of the non-public

9. The statutory language which requires that the materials and equipment "be incapable of diversion to religious use" does not change the result. Such things as projection and recording equipment are "readily divertible to religious uses" and, consequently, "excessive entanglement of church and state would result from attempts to police [their] use . . ." *Meek*, *supra* at 366, n.16.

schools; and that most may constitutionally be provided outside of the non-public schools under particularized standards. We believe that the several distinctions which we draw are supported specifically by the decision in *Meek* v. *Pittenger*, as well as the reasoning of *Nyquist* and *Lemon*.

a. Services Which Are Entirely Forbidden

In our view, guidance and counseling services may not be provided in any circumstances, on or off non-public school premises.[10] These services were struck down in *Meek*, where they were furnished on the non-public school premises, on the ground that the necessary "prophylactic contacts . . . give rise to a constitutionally intolerable degree of entanglement between church and state." 421 U.S. at 370. The Ohio statute now before the Court hopes to evade that limitation by providing that guidance and counseling services be furnished only off the premises of the parochial schools. Though the appellants do not challenge such a program provided at public expense if conducted in the public schools as part of a general program (J.S. p.27), presumably on the ground that the entanglement problem will not arise in that context,[11] we believe they grant too much in such a concession. We believe that the problems of entanglement involved in guidance and counseling are so inescapable, we oppose provision of those services no matter under what circumstances.

10. Sec. 3317.06(H) authorizes funds for such services, and requires that they be provided "in the public schools, in public centers, or in mobile units . . ."

11. Appellants do oppose such programs if conducted in public centers or mobile units. We associate ourselves with the arguments put forward by appellants on those grounds.

The court will recall that, although the guidance and counseling services in *Meek* were to be performed by public employees in the parochial schools, the primary apprehension was that those personnel were "performing important educational services . . . in an atmosphere dedicated to the advancement of religious belief . . ." 421 U.S. at 371. Though that physical atmosphere admittedly will not exist inside a public school building, an effective guidance and counseling service cannot be provided to parochial school students unless the public employees consult in depth with the teachers and administrators at the parochial schools in order to understand all that one must know of students, their work, their environment, and their ambitions in order to provide meaningful counseling. Moreover, the sensitive questions of career designation, college choice, selection of major field of study, and job preparation, all involve choices on which parochial school personnel hold strong views, and want their influence felt. The acquisition of the necessary information, and the required communication between the public and non-public employees, present the same "potential for impermissible fostering of religion" (Id. at 372) as existed in the *Meek* scheme.

b. Services Which May Not Be Provided on Non-Public School Premises

Sections 3317.06 (D) and (F) provide that speech and hearing diagnostic services and diagnostic psychological services will be provided at public expense to non-public school students on their school premises.

Though footnote 21 of *Meek* suggested that diagnostic "speech and hearing services" may be a "class of general

welfare services for children" that may be supplied by the state even if an incidental benefit accrues to church-related schools, we urge the Court to review that tentative position and to forbid those services insofar as they are conducted on the premises of the non-public schools, for we believe that problems of entanglement will inevitably arise under those conditions. Diagnostic testing of this type on parochial school premises is as a practical matter so bound up with treatment and follow-up in substantive educational areas, such as curriculum and selection of materials, that substantial monitoring will be required, thus raising the same danger of entanglement present in the less debatable educational areas.

c. Services Which May Constitutionally Be Provided to Non-Public School Students on Public Premises

On the basis of the principles previously discussed, we submit that the First Amendment is not violated if the state provides speech and hearing diagnostic services, diagnostic psychological services, therapeutic speech and hearing services, therapeutic psychological services, and remedial services for the handicapped to non-public school students if those services are performed on public premises by public employees as part of a general program of assistance for all students, public and private, and reasonable steps are taken to insulate the process from the influence of the parochial schools' educational program.

By "public premises" we mean the premises of public schools, or "public centers" and "mobile units", as provided by the Ohio statute. However, if the services are furnished in "public centers", such centers must be de-

signed and used to provide services to all students, public and private, and not be a subterfuge that give the appearance of being public but are actually used to provide the allowed services only or predominantly to parochial school students. Likewise, if "mobile units" are utilized to provide the allowed services, they must be the general method by which the services are provided to all students, public and private. They must in fact be mobile; they certainly cannot be permanently or semi-permanently stationed outside the door of one or more parochial schools in the hope that the slight physical distance between the school building and the unit will satisfy the constitutional standard.

If the conditions we describe above are met, and if the enumerated services are provided in premises which are in theory and in fact neutral and religion free, then provision of those services does not in our opinion violate the Establishment Clause. In those circumstances, none of the three elements of the test for measuring violations of the Clause is met.

The crucial distinction is between services which are a part of the educational process of the parochial schools, and those which are non-educational and which objectively serve the health and welfare of non-public school students. If the services do serve the educational process, then they inevitably will have the primary effect of serving religion, since that is the dominant mission of church-related schools; and they will also, and with equal inevitability, result in the entanglement of church and state in the process which requires the state to be "certain" that that religious mission is not advanced. Where constitutionally

possible, we should avoid those situations which deprive any school child of services which objectively serve his or her physical or psychological health, or capacity to read, hear and speak effectively, which are generally available to students in the public schools, and which are conducted so as to avoid the problem of entanglement. Thus, we have attempted to draw a reasonable line which distinguishes between forbidden services, and those other services involving the physical and psychological health of the child which may be supplied to non-public school students under appropriate conditions without offending the Establishment Clause.[12]

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12. Only two types of services can, in our opinion, be provided on the premises of non-public schools. The first are those supplied by physicians, nurses, dentists and optometrists. Of course, Sec. 3317.06(E) of the statute before the Court provides for those very services to be furnished to parochial school students, but is not challenged in this suit. We believe, as the appellants apparently do, that such services are constitutional even if provided on non-public school premises since they directly serve the health and welfare of the students rather than any part of the schools' educational function, and therefore do not have the primary effect—or, indeed, any effect—of advancing religion. In addition, those services, by their very nature, do not present any of the dangers of entanglement between church and state since they need not be monitored to assure that the personnel involved do not advance the schools' religious mission. But even these kinds of medical services must meet two standards in order to pass the test of constitutionality. They must be part of a general program of inoculations, diagnosis, treatment or screening; and in order to avoid functioning as a subsidy to the church-related schools, the involved medical personnel may not be placed in those schools on a full-time or regular part-time basis.

The second service which may be supplied on non-public school premises is a course of strict physical therapy provided for the physically handicapped.

Though we believe that Secs. 3317.06(J) and (L), which provide respectively for provision from public funds of tests and scoring services, and field trip transportation, offend the Establishment Clause, we will, in the interest of brevity, associate ourselves with the arguments put forward by the appellants.

Conclusion

For the reasons set forth above, the decision below should be reversed and remanded.

Respectfully submitted,

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